

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP1301

Cir. Ct. No. 2011FA9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

CLIFFORD L. HERFEL,

PETITIONER-APPELLANT,

V.

LORNA L. HERFEL N/K/A LORNA L. SIMPSON,

RESPONDENT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 BLANCHARD, P.J. In this divorce case, Clifford Herfel challenges three decisions of the circuit court: a valuation of real estate subject to

property division contained in the judgment of divorce; an order finding Herfel in contempt of court; and conditions for purge contained in the contempt order. Regarding the court's property valuation, Herfel argues that the court improperly ignored expert testimony on the value of farm real estate, based the valuation on "stale" evidence, and failed to explain adequately the court's basis for denying a motion for reconsideration of the valuation. Regarding contempt, Herfel argues that the circuit court lacked evidence regarding his ability to make payments required under the judgment of divorce and payments required to purge the contempt.

¶2 Herfel fails to persuade us that the circuit court did not properly exercise its discretion in determining the value of the farm real estate as of the date of the divorce, based on all the evidence presented to the court. We also conclude that the court was not clearly erroneous in finding Herfel in contempt or in setting the purge conditions. Accordingly, we affirm.

BACKGROUND¹

¶3 Herfel and Lorna Simpson were married in 2001. In 2004, Herfel and Simpson bought farm property that included farm buildings, a farm home, and

¹ Our progress in resolving this appeal was significantly and unnecessarily delayed by Herfel's failure, as the appellant, to make sure that the record transmitted to this court contained all documents material to the issues he raises on appeal. *See State v. Dietzen*, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991) (appellant responsible for assembling and submitting record); *see also* WIS. STAT. § 809.15(1)(a) (2011-12) (record on appeal includes transcripts and material exhibits). After the appeal was submitted on the briefs, we discovered that none of the following were listed on the record index: the transcripts from the contested hearing; exhibits referred to by the parties at the hearing and again now on appeal; and an order denying a motion that Herfel challenges on appeal. As a result, these documents were not initially transmitted to this court, requiring this court to have these items added to the index and transmitted to this court.

approximately forty acres of land, some of it tillable. Herfel petitioned for divorce in January 2011. This farm property is the only real estate at issue in this appeal.

¶4 The first day of a two-day contested divorce hearing was in July 2011; day two was in September 2011. At the contested hearing, two written appraisals of the value of the farm real estate were introduced as exhibits. These appraisals were conducted by different appraisers, and neither appraiser testified during the hearing. One appraisal, dated November 17, 2009, was by William Mergen. Mergen found the value of the farm real estate to be \$342,000. The second appraisal, dated June 6, 2011, was by William Wood. Wood found the value to be \$290,000. The Wood appraisal was ordered by the law firm representing Simpson in the divorce.

¶5 Separately, the court also received as exhibits balance sheets dated September 22, 2009, and December 17, 2010, that reflected valuations of property, including the farm real estate, prepared by a bank consultant, based in part on information supplied by Herfel. A witness at the contested hearing, Tom Gorman, an officer of a bank that had a lending history with Herfel and Simpson, testified regarding these balance sheets. Gorman testified that they were prepared by the bank consultant, with Herfel's input, as part of the process of applying for guarantees on existing loans by the United States Department of Agriculture Farm Service Agency. Gorman testified that lenders such as himself must trust borrowers such as Herfel to provide accurate information about the value of collateral reflected in balance sheets, and that there is potential criminal liability for making a material misrepresentation on a loan application. The September 2009 balance sheet reflected the value of the farm real estate and land at \$525,000, total farm assets at \$811,500, and total equity at \$189,126. The December 17,

2010 balance sheet reflected the value of the farm real estate and land at \$525,000, total farm assets at \$850,435, and total equity at \$253,179.

¶6 Following the contested hearing, on October 19, 2011, the court issued a written order providing calculations of marital assets and liabilities pertinent to maintenance and property division. Among the court's calculations was a determination that the "average value" of the farm real estate was \$422,142.

¶7 The court incorporated the October 19, 2011 order into the court's findings of fact, conclusions of law, and judgment of divorce, issued in January 2012. In this January judgment, the court awarded to Herfel all right, title, and interest in the farm real estate, subject to outstanding mortgages on the property. The judgment also required Herfel to either refinance and pay off \$28,398 in credit card debt under Simpson's name or make the required minimum monthly payments on that debt, beginning on November 1, 2011.

¶8 On October 26, 2011, Herfel moved for relief from the October 19, 2011 order, as incorporated into the judgment, arguing in part that the court's farm property valuation of \$422,142 was a "mistake," because the Mergen and Wood appraisals were each lower than this amount. After holding a hearing on this motion on November 29, 2011, the court denied it in an order dated January 17, 2012.

¶9 At the hearing on the motion for relief, and then further during the course of the latter hearing on the separate contempt issue, the court explained its farm property valuation approach. The court explained that it relied primarily on "Mr. Herfel's representations for purposes of financing" on the balance sheets, and less on "the appraisal prepared purposely for the divorce" litigation. The court further explained that it applied "an averaging out of what [Herfel's] own numbers

showed,” and paid less attention to “an appraisal for purposes of divorce,” which is “subject to expert extractions and interpolations and the opinions of realtors.”

¶10 On February 15, 2012, Herfel filed a motion for reconsideration of the January judgment regarding the real estate valuation, which echoed the October 26, 2011 motion for relief already denied by the court. In this motion, Herfel asserted that appraiser Mergen had conducted a new appraisal of the property, as of February 2, 2012, and concluded that the value was \$290,000. Herfel argued that the court should set the value at \$290,000.

¶11 On March 13, 2012, the court denied the motion for reconsideration, noting that the issues had been “capably and fairly tried.” The court further noted that, “in the volatility of today’s real estate market,” the valuation of the farm property must be derived from the “totality of the circumstances surrounding the allocation of debt and assets” involving the farm property.

¶12 On February 29, 2012, Simpson asked the court to find Herfel in contempt of court for failure to either refinance the credit card debt or make the minimum monthly payments required under the judgment of divorce, as summarized above. Simpson averred that she had paid \$3,682 towards this debt, even though the court had assigned it to Herfel.

¶13 At the hearing on the contempt request, held on April 2, 2012, Herfel testified that he had paid only \$300 toward this debt, “because I don’t have the money to” pay more. Herfel asked the court, “Do I [let] my farm bills go[, in order] to pay her credit cards?” Herfel testified that he had approached a bank to get financing to pay off this credit card debt, and had been turned down.

¶14 Simpson argued at the contempt hearing that, based on Herfel’s tax returns for 2011, Herfel had “real positive income” of “\$66,000 that was available to him throughout the course of the year.” Simpson also argued that Herfel had not made a sincere or extensive effort to obtain financing for this credit card debt, which apparently with interest and fees had risen to a total of approximately \$45,000. Instead, Simpson argued, Herfel had approached a single bank and then only with a larger financing request for a greater debt package, which was less likely to succeed.

¶15 The court determined that Herfel could have dedicated, and still could dedicate, some of his cash flow to the credit card debt, in addition to paying off other debts, and that he should consolidate all of these debts to create a single “monthly servicing fee.” The court essentially concluded that Herfel had decided not to make a priority of the credit card debt and could do so. On this basis, the court found Herfel in contempt, and gave him sixty days to pay the same amount that Simpson had paid against this debt, \$3,682, in order to purge the contempt.²

DISCUSSION

I. Farm Property Valuation

¶16 Herfel raises three objections regarding the court’s valuation of the farm real estate. First, Herfel argues that the court based the valuation on “a financial disclosure statement that was not vetted by an expert appraiser” and “clung to the highest appraisal possible in order to find that [Herfel] had positive

² Herfel inaccurately states that the court ordered “sixty days jail.” Instead, the court ordered Herfel to pay \$3,682 within sixty days in order to purge himself of the contempt finding.

equity in the farm that he could borrow against.” Second, Herfel argues that the court relied on “stale” evidence. Third, Herfel argues that the court inadequately responded to his motion for reconsideration regarding the valuation. We now explain why we reject each of these contentions. Our standard of review plays a significant role.

¶17 Valuation of a marital estate rests within the sound discretion of the circuit court. *Rumpff v. Rumpff*, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 688 N.W.2d 699. Therefore, this court affirms property division awards when they represent rational decisions based on the application of correct legal standards to the facts of record. *Id.*

¶18 Herfel’s first argument rests on the inaccurate premise that the court “cited no basis for exceeding the average of the expert appraisals.” In fact, the court made at least two observations in support of its valuation decision, based on the extensive evidence before the court, and these observations provide rational bases for its valuation approach. First, the court noted that valuations that Herfel himself signed off on in support of the application for federal loan guarantees had strong inherent reliability. Second, the court noted that, while it was not suggesting “wrongdoing” by anyone, there is a tendency for appraisals conducted in the context of a divorce action to be less than reliable. We note that neither appraiser testified, leaving the court to draw what inferences it could from the written appraisals, based on the testimony of other witnesses and other documentary evidence.

¶19 Herfel argues that the court “clung to the highest appraisal possible.” This allegation is not impressive. It appears to be based on nothing more than the fact that the valuation reached by the court resulted in positive equity in the farm.

Further, Herfel provides no support for the contention that the court could not consider the balance sheets unless they had first been “vetted,” in some manner not identified by Herfel, through expert testimony. Herfel argues that the court “pulled out the number” in order to reach an “inflated assessment.” Colorful rhetoric attempting to suggest caprice or hidden motives on the part of the circuit court is no substitute for legal analysis based on the details of the record.

¶20 Herfel’s second argument is based on the rule that marital property should generally be valued as of the date of the divorce. *See Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990) (general rule is that marital assets are to be valued as they exist on the date of the divorce, absent special circumstances). Assuming without deciding that the general rule applies here, Herfel does not develop an argument, based on the record and legal authority, that the court used “stale” evidence when it considered all evidence offered during the contested hearing. The fact that the court gave more weight to the balance sheets in the loan application than to the two appraisals does not in itself prove that the court relied solely on “stale” evidence. Herfel does not attempt to analyze the evidence presented to the court, but instead simply asserts that the evidence the court relied on was “stale.” We reject this argument as conclusory and unsupported. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶21 Herfel’s third argument regarding the valuation is that the court inadequately explained its denial of the motion for reconsideration from the order containing the valuation. We reject this argument for the following reasons. Herfel is far too imprecise in distinguishing between: (1) the court’s treatment of

his October 26, 2011 motion for relief, which resulted in a hearing and denial on January 17, 2012,³ and (2) the court's treatment of his February 15, 2012 motion for reconsideration, which the court denied in writing on March 13, 2012. The motion for relief and the motion for reconsideration sought the same relief for essentially the same reasons, with only one potentially insignificant piece of additional information added to the motion for reconsideration, as discussed below. Therefore, any meritorious argument that the court lacked a basis to deny the motion for reconsideration would need, at a minimum, to explain why the court's handling of the motion for relief was inadequate and could not serve as a basis to support denial of the motion for reconsideration.

¶22 To the extent that Herfel now argues that new information offered by Herfel in his motion for reconsideration was so compelling that it was clearly erroneous for the court to fail to change its valuation decision based on this evidence, such an argument would have no merit. The motion for reconsideration was accompanied by a one-page opinion letter from Mergen, flatly asserting a value of \$290,000, with no explanatory information and not accompanied by an affidavit by Mergen or anyone else bearing on Mergen's new opinion, coming months after the contested hearing on these issues. Assuming without deciding that this unsworn, unexplained opinion should have counted as new evidence, the court would have been entitled to discount it as a mere bare assertion potentially

³ An additional defect in this argument is a record problem separate from the ones noted in footnote 1. Herfel failed to have included in the record the entire transcript of the November 29, 2011 hearing on his motion for relief, which as we explain in the text is related to the challenge Herfel makes to denial of his motion for reconsideration. "[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court's ruling." *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). This is an independent basis supporting affirmance on this issue.

influenced by sharply contested litigation. And, as we have already explained, the court provided a rational explanation for its valuation, appearing to rely on legal standards that Herfel does not question. The court was not obligated to accept any given appraisal number at face value in light of conflicting evidence.⁴ See **State v. Brown**, 2005 WI 29, ¶88, 279 Wis. 2d 102, 693 N.W.2d 715 (“Neither a circuit court nor a reviewing court is required to accept an expert’s ultimate conclusion.”).

II. Contempt

¶23 Herfel asserts, briefly, that there is no record support for the court’s finding that he had the ability to pay the credit card debt and, also briefly, that the court provided inadequate direction as to “how he could realistically pay the amount set by the purge order within the set timeframe.”

¶24 We review a circuit court’s contempt finding for an erroneous exercise of discretion. **Frisch v. Henrichs**, 2007 WI 102, ¶29 n.13, 304 Wis. 2d 1, 736 N.W.2d 85. Under this standard, we uphold the court’s contempt finding unless Herfel can show that the court misconstrued the law or the facts or

⁴ Before leaving the topic of the farm real estate valuation, we note that, in the Conclusion section of his principal brief, Herfel makes a request that goes far beyond the scope of the argument addressed in the text. The argument that Herfel attempts to make in the body of his principal brief, addressed in the text, is that this court should reverse and remand for recalculation of property division based on a lower value for the farm real estate, apparently \$290,000. However, in the Conclusion section, after questioning the circuit court’s overall approach to property division in this case, Herfel states that this court “should remand with instructions to divide the debt between the parties *in a more equitable way, with more specific findings as to the parties’ current cash flow.*” (Emphasis added.) We decline to address this request, which purports to challenge the overall structure of the property division. It is entirely undeveloped and does not fall within the scope of any argument section of the brief.

otherwise reached an unreasonable conclusion. *See Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).

¶25 Because Herfel does not analyze the evidence that was before the circuit court in the argument sections of his brief to develop either of these two purported arguments, we could reject them as undeveloped. However, we will treat the assertions as arguments and reject them on the merits.

¶26 Herfel suggests that the “record is absent” of evidence that Herfel could pay the credit card debt. This is inaccurate. There was extensive evidence that raised competing inferences on this question. This included evidence raising the inference that, despite having a positive income flow, Herfel decided to prioritize other financial obligations over the credit card debt that he was ordered to pay. For example, there was testimony during the contested hearing that Herfel had an annual cash flow of \$44,000 after satisfying his debt service. The record makes clear that the court found that Herfel had not made sufficiently focused efforts to address the credit card debt as his own financial priority. The court observed that Herfel had decided that this debt is “Lorna’s dead pony and I got to pay it and I don’t want to.” Herfel does not address this aspect of the record as part of his purported argument on this issue, which would be a first step in attempting to show that the court erroneously exercised its discretion in finding him in contempt, despite evidence that Herfel had a positive income flow.

¶27 As to Herfel’s suggestion that the court did not make a reasonable assessment of Herfel’s ability to pay \$3,682 within sixty days, the record reflects extensive evidence and discussion by the court on the topic of Herfel’s access to farm income and potential loans at both the contested hearing and the contempt hearing, some of which we have already referenced above. While repeatedly

expressing sympathy for Herfel based on the uncertain nature of income generated by a relatively small farm, the court observed that Herfel needed to consider delaying payments on some farm obligations and to treat the credit card debt with the same degree of urgency as he treats “farm debt.” The court effectively found that Herfel had not yet done the following: “sit down with your banker and tell [the banker] that that judge down there told me I had to do this, and I got to figure out how.” Herfel fails to point to an error of law or inaccurate fact relied on by the court in deciding that Herfel could, within sixty days, pay the same amount that Simpson had already paid on this debt.

CONCLUSION

¶28 For these reasons, we affirm the judgment of divorce, including the real estate valuation, and the order finding Herfel in contempt, including its purge feature.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

